Supreme Court, U.S.
FILED
JUL 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1726

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALBERT M. LEFKOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether search warrants issued to an Internal Revenue Service special agent, on the basis of affidavits of probable cause containing information supplied by a confidential informant, are rendered invalid by the affidavits' failure to identify the confidential informant as petitioner's estranged wife.

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OPINIONS BELOW

The opinion of the district court is reported at 464 F. Supp. 227. The memorandum opinion of the court of appeals (Pet. App.) is reported at 618 F. 2d 1313.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1980 (Pet. App. 1). On March 31, 1980, the court of appeals denied a petition for rehearing filed by petitioner. The petition for a writ of certiorari was filed on April 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a non-jury trial on stipulated facts in the United States District Court for the Central District of California, petitioner was convicted of conspiring to defraud the United States, submitting false statements to the Internal Revenue Service, concealing records from the Internal Revenue Service, making a false income tax return, failing to file an income tax return, and attempting to evade and defeat income taxes, in violation of 18 U.S.C. 371 and 1001, and 26 U.S.C. 7201, 7203 and 7206(1). The trial court sentenced him to four years' imprisonment to be followed by three years' probation.

The stipulation of facts was entered following the trial court's denial (R.T. 3-12)[1] of petitioner's motion to suppress evidence consisting of corporate books and records obtained upon execution of warrants to search petitioner's home and office, and its subsequent denial of petitioner's motion for reconsideration.

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[1]"R.T." refers to the Reporter's Transcript of Proceedings held on September 29, 1978, and October 20, 1978.

The facts pertinent to the search warrants are as follows: On November 17, 1975, United States Magistrate Venetta Tassopulos issued warrants to search petitioner's residence and the corporate offices on the basis of two identical affidavits submitted by Internal Revenue Special Agent Martin G. Laffer (C.T. 322).[2] The affidavits related information provided by Marc Nestico, a former employee of one of petitioner's corporations, and by a confidential informant, subsequently revealed to be Helen Lefkowitz, petitioner's estranged wife (C.T. 99-106). The information provided by Helen Lefkowitz was that she, along with petitioner, Patricia Sullivan (petitioner's secretary), Lloyd Fisher (petitioner's accountant), and Marc Nestico, had met and transferred certain corporate records, which had been summoned by the IRS, from file cabinets to cardboard boxes and that petitioner then removed the boxes of records; that she had been informed by petitioner that he had transported the boxes to his secretary's apartment; that she knew from personal observation that the records which had been submitted pursuant to an Internal Revenue Service summons to Agent Laffer on July 14, 1975, were fabricated and backdated; that the accountant Fisher had prepared false corporate journals, and that the original journals had been removed from one suite to another in the corporate offices and subsequently returned to the original suite following a meeting there on July 14, 1975, between petitioner, his lawyer, Edward W. Babic,[3] and Special Agent Laffer (C.T. 101-102).

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[2]"C.T." refers to the Clerk's Transcript of Record.

[3]Babic was convicted of conspiracy and of aiding and assisting the presentation to the Internal Revenue Service of fraudulent documents in violation of 18 U.S.C. 371 and 26 U.S.C. 7206(2) (Pet. App. 2 n.1). See *United States* v. *Babic*, 614 F. 2d 777 (9th Cir. 1980) (table), cert. denied, No. 79-1351 (June 2, 1980).

Laffer's affidavit stated that he had been provided by the confidential informant with accurate information which he believed established her reliability. The corroborative information listed in the affidavit included detailed accounts of numerous personal and business transactions involving petitioner and his corporations (C.T. 102-104).

Laffer's affidavit also related information that had been provided by Marc Nestico to Special Agent George Lindholm. This information included the facts that in September 1975, during the period in which Nestico was employed by one of petitioner's corporations, he had moved into an apartment vacated by petitioner's secretary; that petitioner instructed him to remove several boxes containing records from the apartment to petitioner's residence; that Nestico did move such boxes to petitioner's residence; that petitioner informed him that the boxes were important and instructed him not to tell anyone about them; that Nestico had seen the records at petitioner's residence at the end of October 1975; and that he had also then seen corporate accounting-type records in the suite at the corporate offices referred to in the information provided by Helen Lefkowitz (C.T. 104-105).

On September 29, 1978, the trial court revealed the identity of the confidential informant to be Helen Lefkowitz (R.T. 7), whereupon petitioner argued that the warrant should be invalidated on the ground, *inter alia*, that the omission of Helen Lefkowitz's identity deprived the magistrate of an opportunity effectively to determine her credibility, in light of petitioner's assertions of prejudice on the part of Helen Lefkowitz against her husband (C.T. 281-298, 325-336).

The trial court denied petitioner's motion to suppress. It held that the affidavits of probable cause were sufficient

on their face (464 F. Supp. 227, 231-232 (C.D. Cal. 1979)) and that the omission of Helen Lefkowitz's identity from the affidavits did not invalidate the warrants under the standards announced in *Franks* v. *Delaware*, 438 U.S. 154 (1978) (464 F. Supp. at 232-234). The court of appeals affirmed (Pet. App. 2-6, 9).

ARGUMENT

1. The decision below correctly held that the failure of the affidavits to reveal the informant's identity as petitioner's estranged wife did not invalidate the warrant under *Franks* v. *Delaware*, 438 U.S. 154 (1978). In *Franks*, this Court resolved an "important and longstanding issue of Fourth Amendment law," *viz.*, whether a criminal defendant can "ever have the right, * * * subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant" (438 U.S. 155). The Court held that where a defendant makes a substantial preliminary showing that a false statement was included in an affidavit knowingly and intentionally, or with reckless disregard for the truth, a hearing must be held at the defendant's request. If the defendant then establishes the alleged perjury or reckless disregard by a preponderance of the evidence and likewise establishes that the affidavit, purged of the intentional or reckless falsehoods, would have been insufficient to establish probable cause, then the warrant will be deemed void and the fruits of the search excludable to the same extent as if probable cause had been lacking on the face of the affidavit (*id.* at 155-156).

Here, in denying petitioner's suppression motion, the trial court correctly distinguished *Franks* on the ground that the allegedly misleading factor in the instant case was the omission of the identity of a confidential informant, rather than an affirmative misrepresentation of fact. It

held, however, that *Franks* required a misleading omission to be treated the same as a misleading misstatement. It found that the confidential informant's identity as petitioner's estranged wife was material to her credibility and should therefore have been revealed. But it further concluded that the magistrate could have found the informant credible even with knowledge of her identity, and therefore held that the omission of the identity did not invalidate the warrant.

Assuming *arguendo*, as did the court of appeals (Pet. App. 5 n.3), that *Franks* applies to potentially misleading factual omissions,[4] it remains evident that the warrants at issue are not invalid under the standards announced in that case. The test for the materiality of misleading factual misstatements is whether with the "false material set to one side" (or, here, with consideration also given to the omitted material), the revised content is insufficient to establish probable cause (438 U.S. at 156). Here, the trial court expressly found that Helen Lefkowitz's information would have been credible to the magistrate, even if her identity had been disclosed. This finding is clearly supported by the fact that if Helen Lefkowitz's identity had been disclosed, the affidavit would have indicated that she was reporting criminal activities in which she had directly participated, demonstrably against her interest. Moreover, her description of Marc Nestico's involvement in the removal of corporate records from the corporate offices was corroborated by the detailed information that he had separately provided to the Internal Revenue Service and that likewise appeared on the face of the affidavit (C.T. 99-106).

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[4]Cf. *United States* v. *Martin*, 615 F. 2d 318, 328 (5th Cir. 1980); *United States* v. *Park*, 531 F. 2d 754, 758-759 (5th Cir. 1976); *United States* v. *House*, 604 F. 2d 1135, 1141 (8th Cir. 1979), cert. denied, No. 79-5549 (Mar. 17, 1980).

2. Petitioner asserts (Pet. 13) that "[t]o attempt to calculate or predict the result the magistrate might have reached had he been properly informed, seriously denigrates Fourth Amendment rights." But in *Franks* the Court held that in passing on a claim that an affidavit for a search warrant was invalid because it contained false representations of fact, the trial court, under appropriate circumstances, would have to determine whether, when material that is the subject of alleged falsity or reckless disregard is set to one side, there remains sufficient content in the affidavit to support a finding of probable cause. Hence, the Court in *Franks* authorized the very inquiry conducted by the trial court in this case and criticized by petitioner.

Contrary to petitioner's formulation of the question presented (Pet. 2), the government did not promise that Helen Lefkowitz would be given immunity from prosecution in return for providing information.[5] Moreover, even if Helen Lefkowitz were motivated to lie to the Internal Revenue Service, petitioner does not allege that the omission of her identity from the affidavit was

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[5]On October 13, 1978, Steven Kramer, the Assistant United States Attorney assigned to petitioner's prosecution, declared under penalty of perjury that to his knowledge Helen Lefkowitz had never informally or formally been offered immunity by any employee of the Department of Justice or the office of the United States Attorney from prosecution in connection with her husband's offenses (C.T. 279). Counsel for petitioner subsequently filed an affidavit, stating that he had been told by Assistant United States Attorney Kramer that Mrs. Lefkowitz had been informed by the Internal Revenue agents who questioned her that the Service followed a practice described as the "innocent spouse doctrine," under which it did not recommend prosecuting the spouse of an alleged tax evader unless there was proof that the spouse had committed overt acts in furtherance of the tax law violation, that Helen Lefkowitz's activities appeared to fall under the protection of the doctrine, but that if the agents acquired information indicating that she had committed overt acts, she could be prosecuted (C.T. 333-334).

done with intent to mislead, or reckless disregard of the possibly misleading nature of the omission.[6] To the contrary, as is often the case with informants, her identity was kept confidential out of concern for possible reprisals by the parties potentially affected by the planned search and seizure. Thus, petitioner's claim also fails under *Franks* in another respect. *Franks* held that even where affirmative false statements are contained in an affidavit of probable cause, the defendant is not entitled to an initial hearing on the basis of allegations that the false statements resulted merely from innocent mistakes or negligence (438 U.S. at 171).[7] As the Court stated, "[t]he deliberate falsity or reckless disregard whose impeachment is permitted * * * is only that of the affiant, not of any nongovernmental informant" (*ibid.*). Since petitioner does not allege any deliberate or reckless misconduct on the part of the government in obtaining

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[6]Petitioner argues (Pet. 13) that "there is no necessity in the first instance to attempt to determine the difficult and elusive question as to whether the omission was caused intentionally with evil purpose, recklessly, or negligently," because "[w]here material information is omitted, the warrant procedure is tainted irrespective of the motivation" of the affiant. But he cites no authority in support of this proposition. Indeed, the case law is uniformly to the contrary (see, *e.g.*, *United States* v. *Martin*, *supra*, 615 F. 2d at 328; *United States* v. *House*, *supra*, 604 F. 2d at 1141.

[7]The trial court did not find that the omission of Helen Lefkowitz's identity was the result of intentional or reckless disregard for the truth. Its finding that her identity was material to her credibility appears to amount at most to a finding of negligence on the part of the affiant. On this record, a finding that the omission of Helen Lefkowitz's identity was the result of intentional or reckless disregard for the truth would be impossible, since Agent Laffer offered to disclose the informant's "identity and relationship" to the magistrate. However, the magistrate expressed little interest in the informant's identity (C.T. 322) (Pet. App. 5).

the warrants (Pet. 13; Pet. App. 5), there is no basis for suppression under *Franks*.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1980

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[8]Petitioner states (Pet. 19) that the trial court concluded it would disregard the information provided by Helen Lefkowitz, and argues that on this basis the court erred in holding that the affidavit was facially sufficient. In fact, both the trial court (464 F. Supp. at 231-232) and the court of appeals (Pet. App. 4) concluded that Helen Lefkowitz's information could be considered reliable and on that basis found the affidavit facially sufficient. As the trial court stated, "the informants tend to corroborate each other in that the information provided by each informant supplies a separate but connecting link in the movement of the corporate records" (464 F. Supp. at 232).

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